85-1399 (2)

Supreme Court, U.S.
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CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

EDWARD HINES LUMBER COMPANY OF OREGON,

Petitioner,

v.

LUMBER AND SAWMILL WORKERS LOCAL NO. 2588 and CENTRAL OREGON DISTRICT COUNCIL, LPIW,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR CERTIORARI

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I.

QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit clearly erred when it ruled that the arbitrator did not exceed his authority in finding contractual limitations on subcontracting of bargaining unit work.

II.

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V.

OPINIONS BELOW AND JURISDICTION

Respondents are satisfied with petitioner's statement of opinions below and jurisdiction.

VI.

STATUTES INVOLVED

This case involves the interpretation of a collective bargaining agreement between the parties. Neither federal nor state statutes have direct bearing on the issues.

VII.

STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction

The district court below has jurisdiction under 29 USC (185(a) and 9 USC ((9, 10.

B. Facts

Respondents (hereafter the Union) are the exclusive bargaining representatives for employees of petitioner Edward Hines Lumber Company of Oregon (hereafter the Employer). The employer operates several facilities and related logging operations in the vicinity of John Day, Oregon. On or about August 13, 1981, the employer entered into a three-year collective bargaining agreement. In September 1982, the employer eliminated its logging crews which were represented by the Union and replaced them with unrepresented subcontractors. Approximately 76 employees were permanently replaced as a result. On September 20, 1982, the Union filed a grievance concerning this action. Pursuant to the collective bargaining agreement, the grievance

procedures were exhausted and the parties agreed to arbitrate the dispute. At the arbitration, the Union stated the issue to be: Did the company violate the collective bargaining agreement in September 1982 by unilaterally eliminating the entire logging department during the term of the collective bargaining agreement? The employer stated the issues to be: (a) Is there any contract limitation on the company's right to subcontract logging; and (b) does the arbitrator have any contractual authority to imply any such limitation? On May 6, 1983, the arbitrator rendered a decision and award upholding the Union's grievance. [1]

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[1] Respondents respectfully submit that the opinion and award of the arbitrator speaks for itself and is attached in the Appendix of petitioner's brief, and thus needs no further commentary in the Statement of Facts. (App. C to Petition for Writ of Certiorari, pp. C-1 through C-32.)

The evidence at the arbitration hearing established that it had always been the employer's practice to use a mix of company loggers and subcontractors. The employer had never utilized only subcontractors and totally excluded company loggers. The employer had consistently utilized a mix of approximately 60% company loggers and 40% subcontractors. On several occasions, the employer informed the Union that it had no intention of changing this policy.

The Union attempted over the years to negotiate language which would have kept the employer from using <u>any</u> subcontractors to perform bargaining unit work. Such a provision was never agreed to and the employer continued its practice of using both company loggers and contractors to perform logging work.

Over the years, the Union filed grievances and proceeded to arbitration in cases involving subcontracting. None of the grievances or arbitrations involved situations in which the employer permanently replaced company logging employees with subcontractors.

C. Proceedings Below

Respondents are essentially satisfied with petitioner's version of proceedings below. Respondents would submit that the opinions of the arbitrator and courts below speak for themselves and are included in the Appendix of Petitioner's Brief.

VIII.

SUMMARY OF ARGUMENT

The stated issues underlying petitioner's request for a Writ of Certiorari are

limited to the interpretation of a particular collective bargaining agreement and have no national importance. In attempting to challenge the arbitrator's decision, the employer seeks to overturn settled law concerning the limited role of the judiciary in its review of arbitration awards.

IX.

ARGUMENT

A. There Are No Compelling Reasons for Granting Certiorari

Supreme Court Rule 17 states that review on writ of certiorari ". . . will be granted only when there are special and important reasons therefor." (Emphasis added.) In the instant case, such "special and important reasons" are lacking. The employer asks this Court to disturb the interpretation of a collective bargaining

agreement rendered by an impartial arbitrator selected by both parties. The collective bargaining agreement negotiated by the parties was entered into on August 13, 1981, had a finite term of three years and is long expired. It contained provisions tailored by the parties to suit their specific individual needs and was not a contract of any nationwide impact. As an aid to interpreting the agreement, the arbitrator carefully examined past practices of the parties, practices which were unique to the parties and which also had no nationwide importance. The arbitrator's interpretation of such a particularized collective bargaining agreement between these parties hardly rises to the status of a case in which there are "special and

important" reasons for granting a Writ of Certiorari.

The legal and factual issues decided by the arbitrator in this case, while of importance to the parties themselves, are of little or no concern to the general public. Under such circumstances, a writ of certiorari must be denied. In Rice v. Sioux City Cemetery, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955), the Supreme Court dismissed a writ of certiorari as having been improvidently granted, and quoted former Chief Justice Taft as follows:

> ". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties and in cases where there is a real and embarrassing conflict of opinion between the circuit courts of appeal." Id. at 79.

Jurisdiction on writ of certiorari was not conferred upon the Supreme Court merely to give the defeated party in the circuit court of appeals another hearing on the merits. Magnum Import Co. v. Coty, 262 U.S. 159, 163, 43 S.Ct. 531, 67 L.Ed. 922 (1922).

In the instant case, the employer masks the essentially private nature of the dispute by overstating the importance of this case to other employers. Employers who wish to protect their ability to subcontract work even to the point of permanently eliminating the jobs of their own employees are capable of protecting their own interests at the bargaining table. In the instant case, the employer never before attempted to subcontract work while permanently laying off bargaining

unit employees; it always utilized a mix of company employees and contractors and it assured the Union on several occasions that it had no intention of changing this practice. The employer never "protected" its ability to emasculate the bargaining unit by replacing its members with subcontractors. The arbitrator in the instant case recognized that the permanent replacement of bargaining unit members with contractors manifested a clear infidelity to the promises made by the employer in the collective bargaining agreement and, in essence, negated that agreement. Clearly, this decision, stemming as it did from the facts of the case, can have little or no effect on other employers, who are free to structure their negotiations and actions as they see fit and according to law.

The employer's attempt to create a "conflict" between the circuit courts of appeal must also fail. The Ninth Circuit's decision in the instant case is perfectly consistent with the decisions of the Fourth Circuit in Clinchfield Coal v. District 28, United Mine Workers, 720 F.2d 1365 (4th Cir. 1983) and Clinchfield Coal v. District 28, United Mine Workers, 736 F.2d 998 (4th Cir. 1984). In these cases, the labor agreement stated that contracting of coal mining operations was prohibited only if it caused the layoff of bargaining unit employees. The Fourth Circuit decided that arbitration awards in favor of the union did not draw their essence from the agreement because the arbitrators involved failed to even consider evidence that any layoffs caused were the result of general

economic conditions and not contracting. The crux of these decisions is that, in light of the express contract language stating that the contracting must cause the layoffs to be impermissible, the arbitrators were duty bound to at least consider evidence of other causal factors. In the instant case, however, the Ninth Circuit recognized that the arbitrator carefully considered and analyzed all of the employer's contentions and specifically addressed them in his decision. It is thus clear that the employer has failed to demonstrate a "real and embarrassing" conflict between the circuit courts of appeal such as to justify granting a writ of certiorari in the instant case. None of the factors listed as guidelines for the granting of a writ of certiorari in Supreme

Court Rule 17 is present herein and the employer's petition should thus be denied.

B. The Employer Seeks to Have This Court Overturn Settled Law

In asking this Court to set aside the arbitrator's carefully reasoned decision, the employer seeks to overturn well settled case law. Such an attempt makes the grant of a writ of certiorari particularly inappropriate. The instant case is governed by this Court's decision in United Steelworkers v. Enterprise Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). In that case, an arbitrator ordered an employer to reinstate certain employees and pay them back wages for a period of time when the collective bargaining agreement between the company and union had expired. The employer argued that the award was

unenforceable due to the contract expiration and the circuit court agreed. The Supreme Court granted certiorari and reversed. The Court stated:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the award." Id. at 596.

The Court reasoned that the arbitrator was commissioned to bring his informed judgment to bear upon the problem before him and needed flexibility in order to be able to meet a wide variety of factual situations which the drafters of the contract might not have envisioned. The Court stated:

> "He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the contract." Id. at 597.

The Court ruled that the arbitrator's award did draw its essence from the contract and stated:

> "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." Id. at 599. (Emphasis added.)

The arbitrator's decision to continue back pay and order reinstatement even after the expiration of the agreement was thus upheld.

United Steelworkers v. Enterprise Corp., supra, is dispositive in the instant case. The arbitrator herein construed the contract's recognition, union security, hours of labor, seniority and other clauses as manifesting a promise not to permanently replace employees with subcontractors

during the term of a valid collective bargaining agreement. The arbitrator furthermore considered the employer's argument that the "management rights" clause and the "entire agreement" clause meant that he had no authority to find any limits on subcontracting even if this resulted in the permanent replacement of bargaining unit employees. The arbitrator construed all applicable provisions of the agreement cited by both parties and decided that the complete cessation of company logging under the unique facts and circumstances of the case before him violated the mutual understandings and practices between the parties. (App. C to Petitioner's Brief, p. C-29.) The arbitrator's decision clearly concerned "construction of the contract" within the meaning of this

Court's decision in United Steelworkers v. Enterprise Corp., supra. The Ninth Circuit's decision that the district court had no business overruling the arbitrator merely because it disagreed with his construction of the contract was correct. To rule otherwise would be to put the courts in the business of reviewing arbitration awards on their merits, which would have the effect of undermining the federal policy of private dispute resolution through final and binding arbitration. See, for example, 29 USC (173(d).

This Court's decision in United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960) is also of paramount importance to the case at bar. In this case, the union filed a grievance protesting the

contracting out of work normally performed by bargaining unit members. The employer refused to arbitrate the dispute on the grounds that the agreement stated that "matters which are strictly a function of management shall not be subject to arbitration." Id. at 576. The union sued to compel arbitration. The district court dismissed the union's complaint on the grounds that the agreement did not "confide in an arbitrator the right to review the defendant's business judgment in contracting out work." Id. at 577. The Court of Appeals affirmed. The Supreme Court reversed and held the dispute to be arbitrable. At the outset, the Court made it clear that a collective bargaining agreement may not be judged simply by its four corners. The Court stated:

> "It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate. . . . The collective bargaining agreement covers the whole employment relationship. It calls into being a new common law - the common law of a particular industry or of a particular plant. Id. at 578-579.

The Court stated that the arbitrator's source of law was not confined to the express provisions of the contract "as the industrial common law - the practices of the industry and the shop - is equally a part of the collective bargaining unit although not expressed in it." Id. at 581-582. Having discussed the role of the arbitrator in general, the Court then went on to analyze the specific dispute before it. The Court interpreted the language "strictly a function of management" as referring "only to that over which the

contract gives management complete control and unfettered discretion." Id. at 584. The Court was of the opinion that silence on the subject of subcontracting did not mean that this was an inherent right of management which was totally unlimited by the contract. The Court ruled that subcontracting disputes were "grist in the mills of arbitrators" and it cited an arbitration award, Celanese Corp. of America, 33 LA 925 (1959), in which the arbitrator had researched applicable law and found 64 arbitration decisions concerning the right to subcontract under a silent contract. Id. at 584, n. 8. It should be noted that many of the cases cited by the arbitrator in Celanese Corp. of America, supra, at 942-943, involved arbitrators finding limitations on the power to

subcontract under contracts which were silent on the issue and which contained broad management rights clauses. See, for example, New Britain Machine Co., 8 LA 720 (1947); General Metals Corp., 25 LA 118 (1955). The Supreme Court's decision in United Steelworkers v. Warrior and Gulf Navigation Co.., supra, thus recognized, sub silentio, that arbitrators have the inherent authority to find some limits on subcontracting even under contracts which are silent on the subject and which contain broad management rights clauses.

Cases which have squarely addressed an arbitrator's authority to find a limitation on subcontracting under a silent agreement have upheld such authority. In Mobil Oil Corp. v. Local 8-766, 600 F.2d 322 (1st Cir. 1979), the employer subcontracted

truck driving work which eliminated bargaining unit jobs. The case was arbitrated, the arbitrator ruled in favor of the union and found that the contracting was a breach of contract which avoided the terms and conditions of the contract. Id. at 324. The contract was silent on subcontracting and contained a clause which gave the arbitrator the power to interpret the express provisions of the agreement, but no power to add to, modify or expand those provisions. Id. at 327. The employer moved to vacate the arbitrator's award. The district court denied the employer's requested relief. The First Circuit Court of Appeals affirmed and ruled that the arbitrator did not base his decision upon the presumed and implied obligations of the parties, but rather had based his decision

on the express terms of the contract, the recognition, seniority, wage and other clauses. Id. at 328. The court stated:

> "The permanent elimination of jobs goes to the heart of a collective bargaining agreement and does implicate these basic provisions." Id. at 329.

This decision affords proper deference to the arbitrator's judgment and is in accord with the Steelworkers cases, supra.

In another case which involved subcontracting, Sears, Roebuck and Co. v. Teamsters Local Union No. 243, 683 F.2d 154 (6th Cir. 1982); cert. denied 460 U.S. 1023, 103 S.Ct. 1274, 75 L.Ed. 495 (1983), the court upheld the right of an arbitrator to find a limitation under a contract which was silent on subcontracting. In this case, the contract stated that the right to subcontract was vested exclusively with the

company. The arbitrator found a violation despite this clear language and the court ruled that he had exceeded his authority in doing so. The court stated, however, that it was "accepted practice for arbitrators to infer a 'reasonableness' limitation on the employer's right to subcontract" when contracts are silent on this issue, and in support of this opposition, it cited Mead Corp., 62 LA 1000 (1973), where the arbitrator found a limitation even under a broadly worded management rights clause. Id. at 156. It is thus clear that neither the Supreme Court, the First Circuit, the Sixth Circuit, nor the Ninth Circuit have ever taken the position that an arbitrator is powerless to find limitations on subcontracting under contracts which are silent on the subject.

In addition to the above-mentioned judicial authority, arbitral authority also establishes that arbitrators may find limits on subcontracting under silent contracts. Thus in Continental Tennessee Lines, Inc., 72 LA 619 (1979), the arbitrator framed the following question:

> "When a three year employment contract specifies hours, wages, and other benefits, reserves the employer's right to abolish the job and otherwise operate and conduct its business, would a reasonable man about to enter into that agreement understand that the company, for economic reasons, can furlough him in favor of another who will do the work at less pay? Id. at 621.

The arbitrator answered "no" as any other answer "would frustrate the object and spirit of the agreement itself." Id. at 621. See Bendix Corp., 41 LA 905 (1963). The modern trend of arbitral

authority is that the contract's recognition and other clauses limit subcontracting and to reject the "reserved rights" theory which holds that management can subcontract at will and which is being advanced by the employer in the instant case. See Elkouri and Elkouri, How Arbitration Works, Fourth Ed. (1985), p. 538.

Many arbitrators have found powerful limitations on subcontracting even faced with strongly worded management rights clauses. In Mead Corp., supra, the arbitrator found a violation of the recognition and other clauses of the contract even in the face of a management rights clause which stated that "all other rights not specifically nullified by this agreement are retained by the company." Supra at 1004. Other cases which hold that

limitations exist even in the face of a management rights clause are almost too numerous to mention. See, for example, United Farm Tools, 80 LA 864 (1983); Town of Van Buren, Maine, 80 LA 105 (1982); Uniroyal, Inc., 76 LA 1049 (1981); Mead Corp., 75 LA 665 (1980). The arbitrator in the instant case merely followed the great weight of arbitral authority in reaching his decision. In doing so, he rejected the employer's argument that the existence of a management rights clause automatically gave it the right to subcontract at will even to the point of eliminating bargaining unit jobs. The employer, however, urges this Court to disregard its own case law, that of the circuit courts of appeal, and the modern trend of arbitral authority in favor of a novel and untested theory of arbitral

authority which has gone unaccepted by any appellate court to this point and for which there is no other legal authority. [2]

An additional reason exists for denying certiorari in the instant case. In W.R. Grace and Co. v. Local 759, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983), this Court upheld the enforcement of an arbitrator's award against the argument that he had exceeded his authority. In that case, the arbitrator refused to be

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[2] The employer's citation of Illinois Coil Spring Co., 268 N.L.R.B. No. 87, 115 LRRM 1065 (1984); aff'd 765 F.2d 175, 119 LRRM 2801 (D.C. Cir. 1985) is misplaced as this National Labor Relations Board decision merely stated that a specific decision to relocate a business did not constitute an illegal midterm modification of a contract under 29 USC (158(d). Nothing in the Illinois Coil Spring Co. case states that an arbitrator has no authority to find a contract violation concerning subcontracting of bargaining unit work after looking to the words of the contract and the practices of the parties.

bound by a prior arbitrator's decision due to his interpretation of the contract. The Court stated:

> "Because the authority of arbitrators is a subject of collective bargaining, the scope of the arbitrator's authority is itself a question of contract interpretation that the parties have delegated to the arbitrator." Id. at 306.

This statement has relevance to the instant case where the employer expressly placed the issue of the arbitrator's authority to find a limitation on subcontracting before the arbitrator for decision. Having given the arbitrator the authority to decide this issue, it seems slightly disingenuous for the employer to now argue that he exceeded his authority in doing so. The employer bargained for a decision on this issue and should not now be able to avoid that decision.

X.

CONCLUSION

For the above reasons, the employer's petition for writ of certiorari should be denied.

DATED this ____ day of March, 1986.

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March 20, 1986

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